IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0121
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JOEY DOMINIC WILLCUTT,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053675

Honorable Stephen C. Villarreal, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By M. Edith Cunningham
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Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Joey Dominic Willcutt was convicted after a jury trial of theft of a means of transportation by control, a class three felony, and third-degree burglary of a

nonresidential structure, a motor vehicle, a class four felony. The trial court suspended the imposition of sentence and ordered Willcutt to serve three years' probation. Counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). As an arguable issue, counsel suggested that this court consider whether structural error occurred when the trial court instructed the jury on reasonable doubt in accordance with the supreme court's directive in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Although Willcutt has not filed a supplemental brief, counsel has, after this court granted her permission to do so. She challenges the restitution order.

¶2 We reject Willcutt's challenge to the reasonable doubt instruction. The supreme court has reiterated the propriety of the instruction, which it directed in *Portillo* that trial courts give. *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). This court may not overrule or disregard supreme court precedent. *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Therefore, we reject this claim.

¶3 In counsel's supplemental brief, she asks this court to vacate the order requiring Willcutt to pay restitution for damage to a block wall that allegedly occurred on August 19 or 20, 2005, when the victim reported her all terrain vehicle (ATV) had been taken from her backyard and a wall had been damaged in the process. The victim asked for

restitution in the amount of $1,382, which represented both the cost of repairing the stolen ATV and the wall. No itemization of damages was submitted, and the court ordered Willcutt to pay the total amount requested; trial counsel did not object. Counsel argues in the supplemental brief the restitution order must be vacated because, by ordering Willcutt to pay for the damage to the wall, the court erroneously required him to pay restitution for an offense of which he was not convicted and which he did not agree to pay. *See State v. Fancher*, 169 Ariz. 266, 267, 818 P.2d 251, 252 (App. 1991) (defendant can only be ordered to pay restitution for offense defendant admitted, was found guilty of, or agreed to pay); *see also* A.R.S. §§ 13-603(C), 13-804(A).

¶4 We directed the state to file an answering brief addressing the propriety of the restitution order. The state concedes the record is unclear which portion of the restitution order represents compensation to the victim for the damage to the wall, which is not the subject of the charges, as they relate to events that took place on August 23, 2005, not on August 19 or 20. Indeed, as the state correctly points out, the prosecutor specified at trial that the state had not charged Willcutt with "going to [the victim's] house and taking the ATV." The state concedes, too, that, to the extent the court ordered Willcutt to pay restitution for the wall, the error is fundamental. *See State v. Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996) (defendant who objected only to portion of restitution order waived all but fundamental error as to other expenses he claimed on appeal were consequential damages and improperly awarded); *see also State v. Whitney*, 151 Ariz. 113,

115, 726 P.2d 210, 212 (App. 1985) (because order required defendant to pay restitution to person who was not a victim of the crime, sentence was illegal and could be "reversed on appeal despite the lack of an objection"). That it is prejudicial error as well is self-evident. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to error waives all but fundamental, prejudicial error). Willcutt appears to have been ordered to pay restitution that he cannot lawfully be required to pay.

¶5 Quoting *State v. West*, 173 Ariz. 602, 610, 845 P.2d 1097, 1105 (App. 1992), the state suggests that we remand this matter to the trial court so that it may redetermine the amount of restitution "'that is factually established in this record and based only on the counts on which defendant was convicted.'" We agree with this proposal.

¶6 We have reviewed the entire record for fundamental error as requested, and other than the error relating to the award of restitution, we see none. We affirm the convictions and the terms of probation but vacate the award of restitution and remand this matter for further proceedings consistent with this decision.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge